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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND
U. S. ACCEPTANCE CORPORATION,
Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL
MOTORS ACCEPTANCE CORPORATION,
Respondents.

REPLY OF RESPONDENTS TO MEMORANDUM FOR UNITED STATES AS AMICUS CURIAE.

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September 27, 1950.

THE BLAKEMORE-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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The *amicus* brief of the Solicitor General supports the application for certiorari on the theory that this Court should define the "precise scope to be given Section 5 of the Clayton Act (38 Stat. 731, 15 U. S. C. 16)."

It does not claim that the reversal and remand were not fully warranted on grounds unrelated to Section 5; it does not attempt to defend the trial court's obviously erroneous instruction to the jury under Section 5 that the criminal judgment against respondents was proof that petitioner's franchises had been canceled pursuant to the

supposed conspiracy as well as evidence of a conspiracy to do everything charged in the indictment; and although asserting that this case raises a question as to the "precise scope" of that section (*Amicus* Memo., p. 1), the Solicitor General does not point out any two possible constructions or any ambiguity in the section or any misconstruction of it on the part of the Court of Appeals.

Indeed, the Solicitor General's only specific objection to the opinion below rests upon an apparent misunderstanding of the rulings of that court and the trial court. The sole concrete criticism which may be garnered from the memorandum is that the opinion of the Court of Appeals states that neither the indictment nor evidence in the criminal case is relevant in the civil suit, whereas the court should have said that the "trial judge * * * should review the pleadings, evidence, and charge in the criminal case, to such extent as is necessary, and present to the civil jury, by appropriate instructions and excerpts from the criminal record, a clear and accurate picture of what was actually litigated and determined in the prior proceeding." (*Amicus* Memo., p. 5.)

But the Court of Appeals did not hold that the indictment and evidence were irrelevant,* and in fact there was no issue in either court as to the right of the trial judge to review the entire record in the criminal case as an aid in instructing the jury as to what had been determined in that proceeding. Respondents contended that this was the proper procedure both in the trial court (R. 217-227) and in the Court of Appeals (App. Main Br., pp. 87, 90, 95),

* The language to which the Solicitor General's memorandum apparently refers is a quotation (R. 9454) from a statement of the trial court in holding that all the evidence in the criminal case was not admissible to the jury in the civil suit, since the issue of what was decided in the criminal case was one of law for the court (R. 443). This ruling with respect to the criminal evidence was not before the Court of Appeals.

and the Court of Appeals expressly so held. Thus that court approved the trial judge's statement that

> "What issues were determined by the judgment of conviction are questions of law to be decided by the court and not issues of fact to be decided by the jury" (R. 9454).

In considering the application of this rule to the record in the criminal case, the Court of Appeals found that, in view of the instructions in that case, a finding by the jury of all the means charged in the indictment was not essential to a conviction (R. 9456). It further found that nevertheless the trial court had permitted plaintiffs' counsel to make to the jury the obviously invalid argument that the judgment and indictment were proof of all matters therein alleged, it sent the indictment to the jury room without any limitations as to its use, and it exaggerated the error by an instruction that the judgment and indictment were evidence not only of respondents' violation of the anti-trust laws but also that plaintiff's dealerships were canceled pursuant to the conspiracy. (Instruction 12, R. 9101-9102.)

The Court of Appeals concluded that sending the indictment "to the jury as an exhibit"* served to give the allegations of acts and means a certain evidentiary value which, under the instructions of the court in the criminal proceeding, they did not have (R. 9457-9458).

The decision was not that in no case could an indictment go to a civil jury, but rather that *it was improper in this particular case in the light of the criminal instructions,* and that the injustice was magnified through unfair argument and erroneous instructions.

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* The Court of Appeals stated it was for the court to examine the indictment as an aid in determining or defining the issues presented by the earlier case (R. 9455), and further, that "The scope of such a judgment may better be determined by reference to the instructions of the court to the jury than to the allegations of the indictment" (R. 9456).

The contention that the ruling below minimizes the evidentiary value of Section 5 and frustrates congressional intent (*Amicus* Memo., pp. 4-5) is likewise erroneous. The Court of Appeals held that the prior judgment was *prima facie* evidence that defendants had conspired to restrain interstate commerce in General Motors cars in violation of the anti-trust laws, and therefore evidence on an essential element of plaintiffs' alleged cause of action. In view of the indictment and charge to the jury in the criminal case plaintiffs can ask for no more here, nor does the Solicitor General's memorandum suggest that any further effect be given to the judgment therein.

It is submitted that the apprehension of the Solicitor General as to the future enforcement of the anti-trust laws arises from a misunderstanding of the opinion of the Court of Appeals. It cannot arise from the actual holding since that is consistent with the Solicitor General's argument.

Respectfully submitted,

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